AGENDA OF THE
AOPA COMMITTEE OF THE
NATURAL RESOURCES COMMISSION

Fort Harrison State Park - Garrison
Lawrence Room
6002 North Post Road
Indianapolis, Indiana

June 22, 2015
9:00 a.m., EDT (8:00 a.m., CDT)

1. Call to order and introductions

2. Consideration and approval of minutes for meeting held on May 19, 2015

3. Consideration of objections with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Holland v. Phillips and Meiners, and DNR (Agency Respondent)*, Administrative Cause No. 14-056W

4. Consideration of objections with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Special Administrative Law Judge in *Moriarity v. Department of Natural Resources*, Administrative Cause No. 12-094W

5. Adjournment

AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
May 19, 2015 Meeting Minutes

MEMBERS PRESENT

Jane Ann Stautz, Chair
R.T. Green
Jennifer Jansen

NATURAL RESOURCES COMMISSION STAFF PRESENT

Sandra Jensen
Dawn Wilson
Jennifer Kane

PARTICIPANTS AND GUESTS PRESENT

Joy Grow

Call to order

The Chair, Jane Ann Stautz, called the meeting to order at 9:02 a.m., EDT, on May 19, 2015 in the Lawrence Room of the Fort Harrison State Park, The Garrison, 6002 North Post Road, Indianapolis, Indiana. With the presence of all three members, the Chair observed a quorum.

The Chair welcomed Dawn Wilson, the new administrative law judge with the Commission's Division of Hearings, and stated, "We look forward to working together."

Consideration and approval of minutes for meeting held on August 28, 2014

R. T. Green moved to approve, as presented, the minutes of the meeting held on August 28, 2014. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

Consideration of objections and with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Holland v. Phillips and Meiners, and DNR (Agency Respondent)*, Administrative Cause No. 14-056W

This item was withdrawn.

Information Item: Representation of corporate parties in AOPA proceedings

Sandra Jensen, the Commission's Chief Administrative Law Judge, presented this item. She explained that the Indiana Chapter of the National Association of Administrative Law Judges (INAALJ) provides a "good pool of [Administrative Law Judges] from a variety of agencies so now we are in a position where we share." Jensen said the Alcohol and Tobacco Commission (ATC) was recently confronted with the issue whether a limited liability corporation is required to be represented by counsel, which began a discussion amongst INAALJ members. She said the Civil Rights Commission has for some time required corporations to be represented by counsel and now the ATC has adopted a similar policy.

Jensen said that she, Wilson and the environmental law judges with the Office of Environmental Adjudication (OEA) have concerns that requiring small corporate entities to be represented by counsel in cases involving minimal civil penalties may effectively deprive them of an opportunity for review. Jensen said the Commission's ALJs have cases that involve oil and gas operators and small nursery operators who may have had a small civil penalty or a notice of violation on an oil and gas well. "At the same time, though, I do not want to put the decisions in jeopardy…The potential is there that if anything were to come of it I think probably…an outcome may be a remand back. I don't think it would be a dismissal, but I don't want to put us in the position of doing the same thing twice. That's really not efficient."

Jensen said the consensus of INAALJ is to seek an advisory opinion from the Office of the Attorney General. She said the courts have not provided a clear-cut answer regarding whether the practice before an administrative body is the practice of law. "We have a hint at that, because of what happened a few years ago with the temporary admissions rules…Yes, they do consider it to be the practice of law." She noted that ALJ Lucas found in *Edwards v. Pressler*, 12 CADDNAR 325, that Edwards could not be represented by a non-attorney under the authority of a General Durable Power of Attorney. Jensen said court decisions are leading to the idea that corporations, as artificial persons, should be represented by counsel. She also noted that some INAALJ members would like to see included in an advisory opinion as to whether there is some way to analogize with the Small Claims Rule 3, which states that corporate entities may be represented by a designated full-time employee of the corporation if the claim does not exceed $1,500.

The Chair asked whether INAALJ has already submitted a request for an advisory opinion.

Jensen said that INAALJ has not yet submitted its request. Jensen noted that she serves as the president of INAALJ, but if the AOPA Committee does not wish to pursue an advisory opinion, she would pass the responsibility to another member.

R. T. Green, having served as a judge for a Small Claims, said that Rule 3 was adopted due to small Subchapter S corporations and LLCs bringing cases before the court in which hiring an attorney would be too expensive relative to the claim amount. Green said he was not aware of the reasoning behind the $1,500 limit, but "what it did encourage on some of those small collection cases you'd end up selling your debt to a collection agency and the collection agency" would appear before the small claims court. He said he does not know whether the origin of the

claim limit was a Supreme Court rule or whether there was a statutory change in the jurisdiction of the Small Claims. "It would be hard for us to say that this is not the practice of law…At the same time try to make access to the little guy, or at least something that we don't act as an impediment to say that it is the practice of law. I would encourage that."

Jennifer Jansen agreed, and stated, "It sounds to me like we need to have representation by an attorney," but noted that she had not considered the impact of the representation requirement on small corporations. "My own bias and my own experience have been, when in doubt it is always a good idea to ask the Attorney General for an opinion."

The Chair agreed with Green and Jansen. "I'm definitely in support of and it would be in the best interest to craft [the request] in such a way that answers the questions that we need to continue to do business appropriately here."

Jensen noted that there are probably other agencies besides the NRC and the OEA that may benefit from an Attorney General's opinion. She noted that the INAALJ representative from Family Social Services Agency raised the issued relative to small corporate vendors.

The Chair said that subsequent to an Attorney General's opinion, the Commission may need to consider adoption of a guidance document or rule, or whether there would need to be a statutory change.

Jensen noted that the Administrative Order and Procedures Act (AOPA) addresses representation, but does not make it clear that the representation must be by an attorney. She said the Supreme Court's rule change regarding temporary admission causes the AOPA "not to be completely at odds, but at least not completely in sync."

The Chair asked whether there would need to be some type of waiver if the claim is below a certain amount. "There is a lot of this to think through, but I do want to be respectful of the cost of hiring attorneys for some of these that are very small claim type situations and not making a burden."

Jensen explained that the Small Claims Rule 3 requires a designation from the corporation for an employee of that corporation to appear and represent the corporation, but there is still the imposition of a claim amount limit. Jensen said that she cannot imagine a situation regarding any disciplinary action imposed on an ALJ for allowing someone to practice law without a license, but it should be considered.

The Chair noted that many times citizens come before Commission without attorney representation.

Jensen said the request for an advisory opinion would essentially provide the same background as contained in the Committee's agenda packet and would also include a list of questions. Jensen indicated that she would seek the Committee's input regarding the list of questions.

The Chair thanked Jensen for her presentation and indicated the AOPA Committee would be happy to review the proposed questions to be included in the request for an advisory opinion. She asked that the AOPA Committee be updated as the request moves forward.

Jensen noted that the AOPA Committee at its August 2014 meeting moved to establish a workgroup to study Information Bulletin #1 (3rd Amendment) with the respect to the consideration of agreed orders. The August 2014 minutes reflect that the constituency of the workgroup would be considered by the Committee at a future meeting.

The Chair recommended that at least one member of the AOPA Committee and one member of the Advisory Council be included in the workgroup. The Chair inquired of any interest by Jansen or Green to serve on the workgroup.

Jansen said she would be interested in serving on the workgroup.

The Chair thanked Jansen for her willingness to serve on the workgroup. The Chair indicated that she would review or coordinate as needed. Chair Stautz said the Commission Chair, Bryan Poynter may wish to provide input, but at the very least may wish to review any amendments.

Jensen noted that the Commission's Division of Hearings no longer provides transcription service. She said Dawn Wilson has assisted in formulating a process in which to review transcriptions of administrative hearings by outside reporting services. Jensen said there may be a future change to Information Bulletin #1 (3rd Amendment) to amend the section regarding transcripts to include the review process that would be followed in order to certify the accuracy of the transcription. She said the proposed amendments would be placed on a future meeting agenda of this Committee.

Adjournment

Jennifer Jansen moved to adjourn the meeting. R. T. Green seconded the motion. The motion was approved and the meeting adjourned at approximately 9:30 a.m., EDT.

Consideration of objections and with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Holland v. Phillips and Meiners, and DNR (Agency Respondent)*, Administrative Cause No. 14-056W:

- Findings of Fact and Conclusions of Law with Nonfinal Order, dated March 24, 2015
- Respondents'/Counterclaimants', Phillips and Meiners, Objections to Findings of Fact and Conclusions of Law with Nonfinal Order
- Petitioners' Response to Objections of Phillips and Meiners

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

WALTER HOLLAND and KATHLEEN HOLLAND, Petitioners,	)	**ADMINISTRATIVE CAUSE NUMBER: 14-056W**
vs.	)	
MARK PHILLIPS, SARA PHILLIPS, and LISA MENIERS, Respondents,	)	**(Riparian Rights Dispute)**
and	)	
DEPARTMENT OF NATURAL RESOURCES, Agency Respondent.	)	

MARK PHILLIPS, SARA PHILLIPS, and LISA MENIERS, Counterclaim Petitioners,	)
vs.	)
WALTER HOLLAND and KATHLEEN HOLLAND, Counterclaim Respondents	)
and	)
DEPARTMENT OF NATURAL RESOURCES, Agency Respondent.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH NONFINAL ORDER

Procedural Background and Jurisdiction:

1. For consideration is the Petition for Administrative Review filed with the Natural Resources Commission's Division of Hearings *("Commission")* by the Claimants, Walter Holland and Kathleen S. Holland, *(collectively referred to as "the Claimants")* on March 17, 2014 seeking resolution of a dispute "concerning the location of their pier on an easement owned by them" that fronts on Dallas Lake, located in LaGrange County, Indiana.
2. The dispute arose as a result of a demand made by the Respondent's, Mark Phillips, Sara Phillips and Lisa Meiners *(collectively referred to as "the Respondents")*, that the Claimants remove their pier as well as any boat lift or boat moored to the pier.
3. Dallas Lake is a public freshwater lake. *Indiana Code § 14-8-2-222, Indiana Code § 14-26-2-3, Information Bulletin #61 (Fourth Amendment), "Listing of Public Freshwater Lakes", http://www.in.gov/legislative/iac/20140924-IR-312140381NRA.xml.pdf.*
4. A prehearing conference was scheduled for April 11, 2014 but upon motion of the Respondents was continued and conducted on May 14, 2014. The Claimants appeared in person and by counsel, Stephen R. Snyder. The Respondents appeared by counsel, William W. Goodin, with individual Respondents, Mark Phillips and Lisa Meiners, also appeared in person. The Indiana Department of Natural Resources *("Department")* also appeared by counsel, Andrew J. Wells. The parties were each represented by counsel throughout the pendency of this proceeding, although on July 12, 2014, counsel, Joy M. Grow, entered her appearance as substitute counsel for the Department.
5. The Department filed a Petition to Intervene in the instant proceeding on April 1, 2014, which was granted on May 14, 2014 during the prehearing conference. The Department was identified as the "Agency Respondent".
6. Also on May 14, 2014 during the prehearing conference, the Respondents filed their counterclaim for relief.
7. During the prehearing conference the parties agreed that an opportunity to file summary judgment motions should be scheduled in the event any party wished to file such motion but further sought to have a final administrative hearing scheduled. No summary judgment motion was filed by any party. Witness and exhibit lists were timely filed and the parties participated in a final status conference as originally scheduled prior to conducting the administrative hearing.
8. The administrative hearing was conducted on November 21, 2014.

9. Following the conclusion of the administrative hearing the parties sought an opportunity to file post hearing briefs by December 22, 2014.
10. The instant proceeding was initiated under the authority 312 IAC 11-1-3(a), which specifies that, "a riparian owner or the department may initiate a proceeding under IC 4-21.5 and 312 IAC 3-1 to seek resolution by the Commission of a dispute among riparian owners, or between a riparian owner and the department, concerning the usage of an area over, along, or within a shoreline or waterline of a public freshwater lake."
11. The Commission serves as the ultimate authority with respect to disputes between riparian owners initiated under 312 IAC 11-1-3. *312 IAC 3-1-2; Indiana Code § 4-21.5-1-15.*
12. The Commission has jurisdiction over the subject matter of this proceeding and over the persons of the parties.

Findings of Fact:

13. The Claimants are the fee title owners of Lots 98 and 99 in Dallas Bay Phase I-B, which lots are not located adjacent to the shoreline of Dallas Lake. *Stipulated Exhibit 28.*
14. The Claimants also hold title to an easement lying adjacent to the shoreline of Dallas Lake described as follows:

> An easement being five (5) feet in width, by parallel lines, off of the east side of Lot 4 in Brunner Park Range 9 East, LaGrange County Indiana. Said easement being for the exclusive benefit of the owner of lot number ninety-nine, in Dallas Bay Phase I-B Dallas Lake for ingress and egress (no motorized vehicles allowed), access to a water line now existing on said easement by grantors or their successors in interest who shall have responsibility for maintenance of their said water line. This agreement shall be construed as a covenant running with the land.

Id.

15. The Respondents own Lot 4 in Brunner Park subject to the Easement, which is described in title records associated with Lot 4 in Brunner Park as follows:

> ...an easement off the east side of said lot number four (4), five (5) feet in width, by parallel lines, for the exclusive benefit of the owner of lot number ninety-nine (99) in Dallas Bay Phase I-B Dallas Lake for ingress and egress (no motorized vehicles allowed), access to a water line now existing said easement by grantors or their successors in interest who shall have responsibility for maintenance of said water line. This agreement shall be construed as a covenant running with the land.

Stipulated Exhibit 34.[1]

16. Testimony received indicates a limited degree of disagreement between the parties as to the exact location of the boundaries of the Easement landward of the shoreline; however, the location of the Easement is not in significant dispute.
17. The eastern boundary of Lot 4 in Brunner Park, which is also the eastern boundary of the Easement, is shared with the western boundary of Lot 3 in Brunner Park, which is owned by John Reed *("Reed"). Testimony of Walter Holland.*
18. Prior to April 11, 1988, Lots 98 and 99 in Dallas Bay and Lot 4 in Brunner Park were all owned by Ralph R. Wilt and Doris M. Wilt *(collectively referred to as "the Wilts"). Stipulated Exhibit 30.* On April 11, 1988, the Wilts sold Lot 4 in Brunner Park to Samuel J. Valentine, Jr. and Loretta J. Valentine *(collectively referred to as "the Valentines")* reserving for their own use, as the current owner of Lot 99 in Dallas Bay, as well as for their successors in interest to Lot 99 in Dallas Bay, the interests specified in the Easement.
19. The Wilts continued their ownership of Lots 98 and 99 in Dallas Bay until December 20, 2004, when the property was conveyed to the D. Marilyn Wilt Revocable Trust. *Stipulated Exhibit 38.* The Claimants purchased Lots 98 and 99 in Dallas Bay by Trustee's Deed dated December 30, 2009. *Stipulated Exhibit 39.*
20. Lots 98 and 99 in Dallas Bay are located to the North of Lot 4 in Brunner Park with County Road 625 South running in an east-west direction between the properties. *Stipulated Exhibit 28.*
21. Title to Lot 4 in Brunner Park was conveyed on numerous occasions after April 11, 1988 until the Respondents' purchase of the property on January 30, 2009. *Stipulated Exhibits 30-37.*
22. From October 2, 1989 until September 2, 1994, Lot 4 in Brunner Park was owned by Thomas L. Rofkahr and Stacy L. Rofkahr *(collectively referred to as "the Rofkahrs"). Testimony of Thomas L. Rofkahr, Stipulated Exhibits 31 & 32.*
23. A water line and associated electrical equipment necessary to provide irrigation water from Dallas Lake to Lots 98 and 99 in Dallas Bay is located on and lies beneath the surface of the Easement. *Testimony of Walter Holland, Stipulated Exhibits 4-6.* The existence of this

[1] The Easement is described uniformly but with inconsequential language alterations within Stipulated Exhibits 28, 29, 30, 32, 33 and 34.

infrastructure predates the Claimants' ownership of Lots 98 and 99 in Dallas Bay.[2] *Testimony of Walter Holland.*

24. In May 2011 the Claimants extended a pier into Dallas Lake from the shoreline of the Easement and continued this activity seasonally until September 2013 when the Respondents demanded removal of the pier. *Testimony of Walter Holland, Stipulated Exhibit 25.*
25. The pier placed within Dallas Lake by the Claimants was approximately four feet wide by approximately twenty feet long. *Testimony of Walter Holland.* The pier generally appears to have been extended into Dallas Lake within a riparian zone established by extending landward property boundaries lakeward. *Stipulated Exhibit 19, Testimony of Walter Holland.*
26. With the permission of Reed, the Claimants placed their pier adjacent to the eastern most boundary of the Easement with their boatlift attached to the east side of the pier, which places the boat lift within the riparian zone associated with Lot 3 in Brunner Park. *Testimony of Walter Holland.*
27. The shoreline of Dallas Lake in the vicinity of the shared boundary between the Lot 3 and Lot 4 of Brunner Park approximates a straight line and the boundary lines associated with Lot 4 intersect the shoreline in a general perpendicular fashion. *Stipulated Exhibits 13 – 16.*
28. The Claimant's pier being approximately four feet wide and situated adjacent to the eastern-most boundary of the Easement is approximately one foot from the boundary of the Easement located nearest to the Respondents.
29. The Claimants' extension of the pier from the Easement and use of the boatlift attached to the east side of that pier does not interfere with the Respondents use of their riparian rights.[3] *Testimony of Mark Phillips, Testimony of Lisa Meiners.*
30. The Rofkahrs ownership of Lot 4 in Brunner Park between October 2, 1989 and September 2, 1994, correlated to the period the Wilts maintained ownership of Lots 98 and 99 of Dallas Bay. *Testimony of Thomas L. Rofkahr, Stipulated Exhibits 31 and 32.*
31. Thomas L. Rofkahr *(T. Rofkahr)* was a business associate of Ralph R. Wilt and had known the Wilts from approximately 1979. *Testimony of Rofkahr.* The Rofkahrs visited the Wilts at

[2] The Hollands made electrical repairs to the irrigation system in 2014 but there is no evidence to support a conclusion that the system was modified.

[3] It is noted that portions of the evidence elicited at the administrative hearing reveal disputes having occurred between the Respondents and the Claimants with respect to activities occurring on the land associated with the Easement. These matters were considered but only as necessary to a determination of the parties' riparian interests, which is the matter primarily within the jurisdiction of the Commission.

the Wilt home on Lot 4 in Brunner Park before the Wilts sale of that property in 1988 to the Valentines and continued to visit the Wilts at their new home constructed on Lots 98 and 99 of Dallas Bay until that property was sold to the Hollands in 2009.

32. T. Rofkahr was the real estate agent who represented the Wilts in the sale of Lot 4 in Brunner Park to the Valentines in 1988, when the language establishing the Easement was drafted. *Id.* T. Rofkahr testified that during the 1988 sale Ralph R. Wilt stated to him that the Easement was necessary only for accessing and maintaining the irrigation infrastructure and was not needed for lake access because the Wilts owned other property abutting a channel by which they had access to Dallas Lake. *Id.*

33. The Wilts did not maintain a pier at the property abutting the channel during much of the time the Rofkahrs owned Lot 4 in Brunner Park except possibly near the end of that time. On later occasions T. Rofkahr observed the Wilts access Dallas Lake using their channel access. *Id.* T. Rofkahr did not recall that the Wilts maintained a pier when they resided on Lot 4 in Brunner Park.

34. On direct examination, T. Rofkahr's testimony appeared to convey that at no time from 1988, when Lot 4 in Brunner Park was sold to the Valentines, until the Wilts sold Lots 98 and 99 of Dallas Bay in 2009, did he observe the Wilts to use the Easement for the purpose of maintaining a pier or mooring a boat. However, on cross examination, T. Rofkahr acknowledged that in 1993, when he and his wife owned Lot 4 in Brunner Park, he assisted Ralph R. Wilt in extending a narrow wooden pier from the Easement. T. Rofkahr explained that the Wilts' daughter and her husband used the pier and occasionally moored a canoe at the pier extending from the Easement. *Id.* According to T. Rofkahr, the pier was only in place for one season before that pier was placed on the Wilts' channel lot.

35. The Rofkahrs did not give the Wilts "permission" to extend the pier from the Easement. T. Rofkahr stated "it was a friendship thing...we didn't question it."

36. T. Rofkahr assisted the Wilts in their seasonal installation of the pump for the irrigation system between 1989 and 1994 when he and his wife owned Lot 4 in Brunner Park. *Id.* T. Rofkahr explained that the pier extended from the Easement in 1993 also provided the ability to place the irrigation pump at a greater depth within Dallas Lake.

37. Since the Wilts were clearly able to install the irrigation system pump without aid of a pier every year except 1993 it can be reasonably concluded that the pier's primary purpose was

for providing recreational access to Dallas Lake along with a location for the Wilts' daughter and son-in-law to moor their canoe.

38. The Respondents and the Claimants agree that the Easement authorizes the Claimants' ingress and egress for the purpose of accessing and maintaining the water irrigation infrastructure that exists within the Easement and serves Lots 98 and 99 in Dallas Bay. However, the Respondents contend that this is the sole use to which the Claimants may put the Easement.

39. The Claimants interpret the Easement language to also grant them the right to extend a pier into Dallas Lake for recreational purposes, including the right to place a pier and moor boats.

Conclusions of Law:

40. The revelation that the Wilts extended a pier from the Easement, as testified to by T. Rofkahr, is inconsistent with testimony of Mark Phillips conveying a 2009 statement purportedly made by Ralph R. Wilt that the Easement was for the sole purpose of accessing the irrigation infrastructure. The placement of a pier from the Easement by the Wilts is also inconsistent with T. Rofkahr's description of Ralph R. Wilt's 1988 statement describing the intended purpose of the Easement. The statements of Ralph R. Wilt, as testified to by Mark Phillips and by T. Rofkahr, are hearsay to which the Claimants properly objected.

41. The hearsay evidence was properly admitted into evidence in the administrative hearing over the Claimants' objection. However, in light of the proper objection, the hearsay evidence that is uncorroborated by independent non-hearsay evidence may not form the basis of an order. *Indiana Code § 4-21.5-3-26.* The hearsay evidence associated with the purported statements of Ralph R. Wilt in 1988 and 2009 as testified to by T. Rofkahr and Mark Phillips, respectively, are not supported by independent non-hearsay evidence. In fact, the only non-hearsay evidence associated with the past use of the Easement is in direct contradiction to the hearsay statements. The hearsay evidence cannot, in this circumstance support an order.

42. The term "riparian rights" refers to:

> a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. These rights are significantly different from each other in many respects, and yet they share a common name just as riparian landowners attempt to share the common benefits that arise from adjacency to defined bodies of water. This bundle includes at least the following rights:
>
> i. of access to the water;

ii. to build a wharf or pier into the water;
iii. to use the water without transforming it;
iv. to consume the water;
v. to accretions (alluvium); and
vi. to own the subsoil of nonnavigable streams and other 'private' waters.

1 WATER AND WATER RIGHTS § 6.01(a)(4), Third Edition, 2013.

43. Riparian rights are enjoyed by the owner of lands lying adjacent to the waters who also possess the corresponding right to protect against the unreasonable use of the waters by others. *Spaw v. Ashley*, 12 CADDNAR 233, (2010) citing *Baughn v, Town of Culver and DNR*, 11 CADDNAR 261, (2008).

44. The State of Indiana, through the Department possesses "full power and control of all of the public freshwater lakes in Indiana" and "holds and controls all public freshwater lakes in trust for the use of all the citizens of Indiana for recreation." *Indiana Code § 14-26-2-5(d)*. Under this regulatory scheme "a person owning land bordering a public freshwater lake does not have the exclusive right to the use of the waters of the lake or any part of the lake." *Indiana Code § 14-26-2-5(e)*. While riparian owners "continue to possess their rights with respect to a public freshwater lake... their rights are now statutory and must be balanced with the public's rights." *Lake of the Woods v. Ralston*, 748 NE 2d 396, 401 (Ind.Ct.App. 2001).

45. As the owners of Lot 4 in Brunner Park, the Respondents are the owners of the riparian rights associated with the correlating shoreline of Dallas Lake.

46. The Claimants, who are not owners of land bordering Dallas Lake, acknowledge they are not riparian owners. However, the Claimants maintain that as the owners of the Easement they hold the right to use the riparian rights associated with the servient estate in issue, the five foot strip off the east side of Lot 4 in Brunner Park. *Koltz v. Horn*, 558 N.E.2d 1096, (1990).

47. A determination of parties' rights with respect to riparian easements must consider:

> Easements burdening land with riparian rights attached do not necessarily provide the easement holder use of these riparian rights. *Brown v. Heidersbach*, 172 Ind. App. 434, 441, 360 N.E.2d 614, 619-620 (1977). Instead, we first look to the express language of the easement. *Klotz v. Horn*, 558 N.E.2d 1096, 1097-1098 (Ind. 1990). 'An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from an examination of all its material parts.' *Brown*, 172 Ind. App. at 441, 360 N.E.2d at 620. Courts may resort to extrinsic evidence to ascertain the intent of the grantors creating the easement only where the language establishing the easement is ambiguous. *Gunderson v. Rondenelli*, 677 N.E.2d 601, 603 (Ind.Ct.App. 1997), (citing *Klotz*, 558 N.E.2d at 1098). A deed is ambiguous if it

is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. See *Abbey Villas Dev. Corp. v. Site Contactors, Inc.*, 716 N.E.2d 91, 100 (Ind.Ct.App. 1999) *trans denied.*

Spaw, supra at 241, citing *Parkinson v. McCue*, 831 N.E.2d 118, 128, (Ind.Ct.App. 2005).

48. "An ambiguity does not exist simply because a controversy exists between the parties, with each favoring a different interpretation." *Stevenson v. Hamilton Mut. Ins. Co.*, 672 NE 2d 467, (Ind.Ct.App. 1996) citing *Harden v. Monroe Guaranty Insurance Company,* 626 N.E.2d 814, 817 (Ind.Ct.App.1993), *trans. denied.* However, in the case that "reasonably intelligent persons would honestly differ as to its meaning" the instrument creating the Easement must be deemed ambiguous. *Abbey Villas*, 716 N.E.2d at 100.
49. Portions of the Easement are clearly unambiguous. Without doubt the location of the Easement is to be five (5) feet in width running along the east side of Lot 4 in Brunner Park with the western boundary of the Easement being formed by a line running parallel to the eastern-most boundary of the lot. The Easement clearly is intended for the sole benefit of the owner of Lot 99 Dallas Bay Phase I-B Dallas Lake, prohibits the use of motorized vehicles and is required to be construed as a covenant running with the land. The Easement certainly grants to the holder the right to access the irrigation system and places upon the holder of the Easement the responsibility to maintain that system.
50. The Respondents highlight the fact that the instrument creating the Easement fails to reference Dallas Lake, the shoreline or any other reference to the water's edge in support of an erroneous conclusion that "no riparian rights were conferred" by the instrument. *Respondents'/Counterclaimants' Post Trial Brief, § III. A.* However, the Respondents simultaneously acknowledge that the instrument grants to the Claimants the right to access and maintain the irrigation system. *Id.* Logically, for the irrigation system to be of use it must access the waters of Dallas Lake.
51. Ownership of the Easement does, without doubt, confer upon the Claimants certain riparian rights associated with the use and consumption of the water but whether the rights conferred were intended to include ingress and egress for additional purposes is less clearly expressed by the instrument.
52. The language of interest is the reference to the purpose of the Easement being "for ingress and egress (no motorized vehicles allowed), access to a water line now existing on said easement....", which is not artfully drafted.

53. The Respondents maintain that the language following the comma creates a limitation upon the grant of ingress and egress by which the Easement grants only those rights of ingress and egress necessary for the limited purpose of accessing and maintaining the existing water line.
54. To concur with the Respondents' position would require the inference that the grantor mistakenly included the use of a comma while omitting a conjunctive word, such as the word "for" before the word "access" creating instead a phrase that reads "for ingress and egress (no motorized vehicles allowed) *for* access to a water line now existing on said easement...". However, this is not the language of the instrument.
55. The express language of the instrument creating the Easement could equally be inferred to include the word "and" in place of the comma by which the phrase would read "for ingress and egress (no motorized vehicles allowed) *and* access to a water line now existing on said easement..." Again, this is not the language of the instrument.
56. It is simply unclear whether the language following the comma was intended as a limitation upon the previous, expressed grant of general ingress and egress or whether that language was intended to emphasize one specific inclusion within the general grant of ingress and egress.
57. It is concluded that the express language of the instrument creating the Easement is ambiguous.
58. The Easement in question is an easement of reservation by which the grantor, who through the creation of the Easement reserved rights for his own benefit. Therefore the use made of the Easement by the grantor, in this case the Wilts, is of particular significance.
59. The Wilts utilized the Easement for the placement of a pier.
60. The Commission adopted "Riparian Zones within Public Freshwater Lakes and Navigable Waters" for the purpose of "[providing] guidance for determining the boundaries of riparian zones within public freshwater lakes and within navigable waters." *Information Bulletin # 56 (Second Amendment), http://www.in.gov/legislative/iac/20100331-IR-312100175NRA.xml.pdf ("Information Bulletin 56").* Within this document the "Second Principle", which specifies that in situations where the "shore approximates a straight line, and where the onshore property boundaries are approximately perpendicular to this line, the boundaries of riparian zones are determined by extending the onshore boundaries into the public waters.".

61. The evidence supports the conclusion that the Second Principle of "Riparian Zones within Public Freshwater Lakes and Navigable Waters" shall be utilized to determine the boundaries of the riparian zone associated with Lot 4 in Brunner Park and the boundaries of the riparian zone associated with the Easement.

Nonfinal Order:

62. The Easement is determined to confer upon the owner of Lot 99 in Dallas Bay Phase I-B, presently the Claimants, full riparian rights including the right to use the servient estate for the purpose of extending a pier into Dallas Lake and the purpose of mooring a boat to that pier.
63. The boundary of the riparian zone associated with the eastern-most boundary of Lot 4 in Brunner Park, which also forms the eastern-most boundary of the Easement, and the western-most boundary of the Easement shall be determined utilizing the Second Principle set forth in Information Bulletin 56. The Second Principle requires the terrestrial property lines to be extended into Dallas Lake.
64. It is recognized that a survey may be required for identification of the exact riparian zone boundaries.
65. The modest dimensions of the riparian zone associated with the Easement will necessarily impose limitations upon its use. Any pier, as well as boats moored to the pier or any other lateral extensions, placed within the riparian zone associated with the Easement must remain fully within the confines of the riparian zone unless permission is obtained from an adjacent riparian owner authorizing an encroachment.
66. The exercise of riparian rights by the parties to this proceeding is subject to the Department's reasonable regulation.

Dated: March 24, 2015

Sandra L. Jensen
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204-2200

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BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

WALTER HOLLAND and
KATHLEEN HOLLAND,

Petitioners,

vs.

MARK PHILLIPS, SARA PHILLIPS,
and LISA MEINERS,
Respondents.

and

DEPARTMENT OF NATURAL RESOURCES,

Agency Respondent.

MARK PHILLIPS, SARA PHILLIPS,
and LISA MEINERS,

Counterclaim Petitioners,

vs.

WALTER HOLLAND and
KATHLEEN HOLLAND,

Counter Respondents,

and

DEPARTMENT OF NATURAL RESOURCES,

Agency Respondent.

ADMINISTRATIVE CAUSE
NUMBER: 14-056W

(Riparian Rights Dispute)

RESPONDENTS'/COUNTERCLAIMANTS', PHILLIPS AND MEINERS, OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER

Respondents/Counterclaimants, Mark Phillips, Sara Phillips and Lisa Meiners ("Phillips and Meiners"), by counsel, pursuant to Indiana Code § 4–21.5–3–29, and 312 IAC 3-1-12, for their objections to the above referenced non-final order, which are hereby submitted to the AOPA Committee of the Natural Resources Commission, respectfully state as follows:

1. Phillips and Meiners object to certain of the findings of fact and conclusions of law as not being supported by the evidence introduced at the hearing of this cause and/or otherwise not in accordance with applicable Indiana law, as more specifically set forth below.

2. Phillips and Meiners object, as contrary to applicable law, to conclusions of law 48 through 57 which provide that the language of the easement at issue in these proceedings is ambiguous and is, thus, subject to interpretation through consideration of extrinsic evidence as to the intent of the easement grantor. Dominant owners of lakeside easements may gain the right to erect and maintain piers, moor boats and the like, where express language in the instrument creating the easement so provides. ***Metcalf v. Houk*, 644 N.E.2d 597, 600 (Ind. Ct. App. 1994), citing *Klotz v. Horn*, 558 N.E.2d 1096, 1097-98 (Ind. 1990)** (emphasis supplied). If the easement instrument is silent concerning the specific rights of the easement holder, then the trial court may allow extrinsic or *parole* evidence to ascertain the intent of the parties who created the easement. *Id* (emphasis supplied).

The easement here contains no language, express or otherwise, which makes any reference whatsoever to riparian rights or even to the public freshwater lake which is subject of this litigation – Dallas Lake. Accordingly, as indicated in *Metcalf* and

Klotz, the dominant owner, Holland, the petitioner/counterclaim respondent in this case, did not gain any such rights. Further, the easement in question is not silent concerning the specific rights of the easement holder. Indeed, the dominant owner is granted access to a water line, consistent with the further purpose stated in the easement that the dominant owner shall have the responsibility to maintain the water line.

Since the easement is not silent about the specific rights of the easement holder, as set forth in *Klotz v. Horn*, no extrinsic evidence is necessary, or even properly considered here. The easement enumerates very specifically – and solely – that the owner of the dominant estate shall have access to maintain the water line. Had it been meant to provide more, the grantor could have so indicated by enumerating additional rights.

3. Conclusion 41 is objected to as not supported by evidence, nor applicable law. Finding of fact 32 specified that a witness called by Phillips and Miners at the hearing, Thomas Rofkahr, was the real estate agent who represented the grantor of the easement in the original sale of the lakefront property at issue, over which the easement was reserved. Rofkahr also assisted the easement grantor in the title work and preparation of the easement. Finding 32 further provided that Mr. Rofkahr testified that, at the time of sale of the lakefront property and reservation of the easement, the grantor, Wilt, stated to Rofkahr that the easement was necessary only for accessing and maintaining the water line that was subject of the easement and that the easement was not necessary for lake access because Wilt owned other property which provided access to Dallas Lake.

Conclusion 41noted that at the hearing Holland made a hearsay objection to

Rofkahr's testimony about Wilt's intent. Accordingly, conclusion 41 states that "in light of the proper objection, the hearsay evidence that is uncorroborated by independent non-hearsay evidence may not form the basis of an order." Citing Indiana Code § 4–21.5–3–26. Further, conclusion 41 states that the "hearsay evidence associated with the purported statements of Ralph R. Wilt... are not supported by independent non-hearsay evidence.... The hearsay evidence cannot, in this circumstance support an order."

This conclusion is contrary to law and the evidence. First, the statements of Wilt testified to by witnesses fall within an exception to the hearsay rule, as delineated in **Indiana Rule of Evidence 803(3)**, which provides in relevant part that an exception exists for:

> A statement of the declarant's [Wilt's] then-existing state of mind (such as motive, design, intent, or plan)....

Further, **IC § 4–21.5–3–26(a)** states:

> The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon hearsay evidence. (Emphasis Supplied)

Because the statement of Wilt offered in evidence by the witnesses was a statement of Wilt's intent regarding the easement, it falls within an exception to the hearsay rule. Thus, pursuant to IC § 4–21.5–3–26(a), such evidence may in fact form the basis of an order. To conclude otherwise was error.

4. Regardless, conclusion 41 is not supported by evidence and is inconsistent with significant, non-hearsay evidence as to Wilt's intent in reserving the easement, such as, by way of example only:

(a) The language of the easement itself says nothing about access to the waters

or the shoreline of Dallas Lake.

(b) Wilt did not tell his realtor he wished to retain riparian rights when he sold the property and reserved the easement to access and maintain the water line even though he (Wilt) continued to own the off-lake property.

(c) The only time Wilt extended a pier from the end of the easement during the 22 years and lake seasons after he reserved the easement in 1988 until he sold the off-lake property to Holland in 2009 was during the time the Rofkahrs, close, personal friends of the Wilts, themselves lived in the lakefront property. In that case, only during one season – 1993 – did Wilt maintain a small pier which Tom Rofkahr helped him install.

(d) Wilt owned channel front lots on Dallas Lake near what would become the Holland Property at the time he sold the lakefront property which Wilt used to place a pier and dock a boat that was used to access Dallas Lake. Thus, Wilt had no need to reserve riparian rights in the subject easement.

(e) Wilt did not advertise the property he sold to Holland as including the right to access Dallas Lake.

(f) Wilt's realtor, Stacy Rofkahr, did not tell Holland's realtor the easement conferred riparian rights.

(g) Holland's realtor advised him to ask the DNR about the issue, which he did not do until several months after Holland purchased the property.

5. To this end, Phillips and Meiners also object to finding 35 which concludes that the Rofkahrs did not give Wilt "permission" to extend the pier during the lone season in 1993. This finding relies on a portion of Thomas Rofkahr's testimony where he stated that "it was a friendship thing...we didn't question it."

It is not reasonable to infer from Rofkahr's statement, or any other evidence in the record, that Wilt's extension of the pier for one summer was not done with the permission of the Rofkahrs. To the contrary, the only reasonable inference to be drawn from this statement and the other evidence in the record is that Wilt's placement of the pier was done with the permission of the Rofkahrs. Indeed, it was done with his friend Tom Rofkahr's help.

6. Importantly, conclusion of law 58 correctly notes that because the easement is one of reservation, Wilt's own use of the easement is of "particular significance." Clearly the weight of the evidence is also particularly significant, in that in 21 out of 22 possible lake seasons Wilt did not extend a pier from the easement and that Wilt accessed Dallas Lake through a channel.

Conclusion 59 states simply that Wilt used the easement for placement of a pier. The only evidence in the record of Wilt's use of the easement for a pier is the single-season use during the Rofkahr's ownership of the lakefront property in 1993, sixteen (16) years before Wilt sold to Holland. Thus, the inference drawn in finding 35 that the Rofkahrs did not give permission for Wilt to place the pier is essential to the administrative law judge's decision that the easement confers riparian rights. Because that inference is not reasonable, however, the foundation of the decision fails and the non-final order cannot be supported.

WHEREFORE, Respondents/Counterclaimants, Mark Phillips, Sara Phillips and Lisa Meiners, by counsel, object to the Findings of Fact and Conclusions of Law with Non-Final Order, as specified herein, and request that the AOPA Committee of the Natural Resources Commission modify and/or dissolve the order, consistent with Respondents'/Counterclaimants' position outlined herein and in a manner which prohibits Holland from extending a pier, mooring a boat and/or exercising any other riparian/*littoral* rights in the location of the subject easement, except accessing and maintaining the water line that is referenced in the easement, that the AOPA Committee set this matter for oral argument, and that it grant any and all other appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by United States First Class mail, postage prepaid, this 13th day of April, 2015:

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BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

IN THE MATTER OF:

WALTER HOLLAND and KATHLEEN S. HOLLAND	)	
	)	**ADMINISTRATIVE CAUSE**
Claimants,	)	**NUMBER: 14-056W**
	)	
v.	)	**(Riparian Rights Dispute)**
	)	
MARK PHILLIPS, SARA PHILLIPS and LISA A. MENIERS	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
DEPARTMENT OF NATURAL RESOURCES,	)	
Agency Respondent.	)	
	)	
MARK PHILLIPS, SARA PHILLIPS, and LISA MENIERS,	)	
Counterclaim Petitioners,	)	
	)	
vs.	)	
	)	
WALTER HOLLAND and KATHLEEN HOLLAND,	)	
Counterclaim Respondents	)	
	)	
and	)	
	)	
DEPARTMENT OF NATURAL RESOURCES,	)	
Agency Respondent.	)	

PETITIONERS' RESPONSE TO OBJECTIONS OF PHILLIPS AND MEINERS

Petitioners, Walter Holland and Kathleen Holland, for response to the objections filed by Respondents, Mark Phillips, Sara Phillips and Lisa Meiners, state:

(Petitioners will respond to the objections as they are numbered in Respondents' pleading.)

1. Paragraph 1 being a general statement, Petitioners will provide detailed responses in the following paragraphs.

2. Paragraphs 48-57 of the Non-Final Order relate to easement language by which Petitioners' predecessors in title (Wilt) reserved an easement in their favor for Lots 98 and 99 in Dallas Bay Phase 1-B. The Respondents' property is subject to that easement as shown by the deed to Respondents' predecessor in title. In all documents, the easement is described as:

> An easement off the east side of Lot Number Four (4), Five (5) feet in width, by parallel lines, for the exclusive benefit of the owner of Lot Number Ninety-nine (99) in Dallas Bay Phase 1-B Dallas Lake for ingress and egress (no motorized vehicles allowed), access to a water line now existing on said easement by Grantors or their successors in interest who shall have responsibility for maintenance of said water line. This agreement shall be construed as a covenant running with the land.

The easement in favor of Claimants is specifically for two purposes: (1) ingress and egress; (2) access to a water line. The easement does not provide only access to the water line, it also provides ingress and egress. If the easement were created only for access to the water line, it could have clearly stated that fact; however, in addition to "access" to water line, it also provides for ingress and egress over its entire length which runs from the public street to the water's edge of Lot Number 4.

An easement providing "ingress and egress" has been found to be ambiguous, allowing the Court to consider parole evidence to determine the intent of the grantor at the time the easement was created. *Klotz v. Horn*, 558 N.E.2d 1096 (Ind.App. 1990); *Metcalf v. Houk*, 644 N.E.2d 597 (Ind.App. 1994).

The Administrative Law Judge was entitled to consider extrinsic or parole evidence to determine the intent of the ambiguous language by which the easement in favor of Petitioners was created. The most significant evidence heard by the Administrative Law Judge was the testimony of Thomas Rofkhar that Wilt, the person creating the easement, actually placed a pier at the water's edge of the easement. That evidence, provided through the personal knowledge of Thomas Rofkhar, is the best indication of the Wilt's intent when the easement was created. *Hutner v. Orbaugh*, 563 N.E.2d 1338 (Ind.App. 1990).

3. The testimony of Thomas Rofkhar and Mark Phillips, being hearsay related to statements made by Ralph R. Wilt, do not fall within an exception to the hearsay rule. A review of the cases issued under Indiana Rule of Evidence 803(3) clearly reveals that the exception is more directed to "state of mind", especially as it relates to criminal acts or a victim's state of mind immediately prior to a criminal act. In the case before the Commission, the intent of Ralph Wilt is properly evidenced by the language contained in the Grant of Easement and Wilt's actions placing a pier at the end of the easement subsequent to its creation. The state of mind of Ralph Wilt is not relevant.

4. The only credible, non-hearsay evidence before the Administrative Law Judge was the language contained in the Grant of Easement and the actions of Ralph Wilt placing a pier at the end of the easement long after he had sold his lake front property. As pointed out in Subsections (b), (d), (e) and (f) in paragraph 4 of Respondents' Objections, Wilt **did not** make the statements contained therein. The failure to make such statements cannot be considered credible evidence of Wilt's intent. His failure to make those statements are more indicative that they were not correct.

5. Finding 35 that Rofkhar did not give Wilt "permission" to place the pier are factually based on the evidence presented. Rofkhar testified he did not indicate to Wilt that the pier could not be placed but rather, refrained from making any statement at all. The failure to make a statement can be construed as attempting to maintain the business relationship between Wilt and Rofkhar as much as based on any "friendship".

6. The mere fact that Wilt did not place a pier at the end of the easement more than one season is clearly indicated by the remainder of the testimony from Thomas Rofkhar that Wilt maintained two other locations on Dallas Lake which he utilized for mooring his boats. Those lots, owned by Wilt, provided him with adequate dock space more convenient and larger than the easement over Respondents' property. Again, the actions of the person creating the easement following its creation are most significant for a determination of the Grantor's intent. *Hutner v. Orbaugh, supra.*

WHEREFORE, Claimants request that the AOPA Committee of the Natural Resources Commission affirm the decision of the Administrative Law Judge entered herein.

SNYDER MORGAN LLP

By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 4 day of May, 2015, a true and correct copy of the foregoing pleading was served upon the following by first class U.S. mail, postage prepaid:

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_____
Stephen R. Snyder

Consideration of objections and with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Special Administrative Law Judge in *Moriarity v. Department of Natural Resources*, Administrative Cause No. 12-094W:

- Findings of Fact and Conclusions of Law with Nonfinal Order, dated April 15, 2015
- Moriaritys' Objections to Findings of Fact, Conclusions of Law and Nonfinal Order
- Respondent's Response to Claimants' Objections to Findings of Fact, Conclusions of Law, and Nonfinal Order

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

MAE E. MORIARITY, JOHN E. MORIARITY And JOHN E. MORIARITY AND MAE E. MORIARITY, husband and wife Claimants,	)	**Administrative Cause Number: 12-094W**
vs.	)	
DEPARTMENT OF NATURAL RESORUCES, Respondent.	)	**(NOV VTS-3933-DM)**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND NONFINAL ORDER

A. Statement of the Proceeding and Jurisdiction

1. By their attorneys on June 13, 2012, Mae E. Moriarity, John E. Moriarity, and John E. Moriarity and Mae E. Moriarity, Husband and Wife (the "Moriaritys") filed a "Petition for Administrative Review" with the Natural Resources Commission (the "Commission") in which the Moriaritys sought administrative review of NOV VTS-3933-DM (the "subject NOV") issued by the Department of Natural Resources (the "DNR"). The subject NOV averred the Moriaritys violated IC § 14-27-7.5 (sometimes referred to as the "Dams Safety Act") and IC § 14-28-1 (sometimes referred to as the "Flood Control Act"). The Petition for Administrative Review initiated a proceeding that is controlled by IC § 4-21.5 (sometimes referred to as the "Administrative Orders and Procedures Act" or "AOPA") and rules adopted by the Commission at 312 IAC § 3-1 to assist with implementation of AOPA. The Moriaritys and the DNR are collectively the "parties".
2. Judge Stephen Lucas was appointed as the administrative law judge under IC § 14-10-2-2. Judge Lucas served a "Notice of Prehearing Conference" upon the parties. The initial prehearing conference was conducted as scheduled in Indianapolis on July 20, 2012. The Moriaritys appeared by their attorneys and in person. The DNR appeared by its attorney and through a Division of Water representative.

3. On May 7, 2013, Judge Lucas issued his Modified Interlocutory Order with Respect to Claimants' Motion for Summary Judgment. Judge Lucas partially granted summary judgment in favor of the Moriaritys. Judge Lucas determined that the subject NOV was insufficient as a matter of law as it pertains to relief sought by the DNR under the Flood Control Act and 312 IAC 10. Further, Judge Lucas concluded that there continued to be a genuine issue of material fact as to whether the Moriaritys were in violation of the Dams Safety Act and 312 IAC 10.5. The DNR has the burden of going forward and the burden of persuasion with respect to the elements of the subject NOV pertaining to the Dams Safety Act (I.C. §14-27-7.5 et seq.) and 312 IAC 10.5.
4. The final hearing in this matter began on November 21, 2013, with Judge Lucas presiding.
5. The hearing was not concluded on November 21, 2013 and was reset. For various reasons, the hearing was continued. Prior to the conclusion of testimony, Judge Lucas retired from state service.
6. On August 15, 2014, Judge Lucas issued an "Order Setting Panel and for Striking. Upon the completion of striking, on August 22, 2014, with the express consent of the parties, Catherine Gibbs was appointed as Special Administrative Law Judge by Judge Lucas.
7. The hearing concluded on December 2 and 3, 2014, with Special ALJ Gibbs presiding.
8. The parties expressly consented to and waived any objections to Special ALJ Gibbs conducting the hearing and making findings based upon the testimony given on December 2 and 3, 2014 and the recorded testimony given on November 21, 2013.
9. The parties stipulated to the admissibility of Exhibits 1 through 24.
10. The Commission is the "ultimate authority" under AOPA and IC § 14-10-2-3 for administrative review of DNR notices of violation, including those under the Dams Safety Act and the Flood Control Act. Generally, *Yoder v. DNR & Bouwkamp*, 12 Caddnar 88 (2009).[1]
11. The Commission has jurisdiction over the subject matter and over the persons of the parties.

[1] As provided in Ind. Code § 4-21.5-3-32, an agency is required to index final orders and may rely upon indexed orders as precedent. Caddnar is the Commission's index of final orders.

B. Findings of Fact

1. The following findings of fact were entered by Judge Lucas on May 7, 2013 as part of the Modified Interlocutory Order with Respect to Claimants' Motion for Summary Judgment. Findings of Fact (a) through (g) are expressly adopted from Judge Lucas' Modified Order and incorporated into this Order.
   a. John E. Moriarity and Mae E. Moriarty own real property as Husband and Wife in Section 15 and Section 16, Township 24 North, Range 8 East, Van Buren Quadrangle, Grant County, Indiana (the "Moriarity real estate").
   b. The Moriaritys caused a water impoundment to be constructed on the Moriarity real estate.
   c. The impoundment was constructed without the prior written approval of the DNR and without a DNR permit.
   d. The impoundment is formed by a dam that impounds a volume of water which greatly exceeds 100 acre-feet.
   e. Because it does not qualify for an exception under I.C. § 14-27-7.5-1, the dam that forms the water impoundment is part of a "structure" as defined at I.C. § 14-27.-7.5-5. The structure is in operation and is subject generally to the Dams Safety Act.
   f. The Moriaritys are collectively the "owner" of a structure as defined at I.C. §14-27-7.5-4.
   g. The subject NOV was issued by the DNR against the Moriaritys on May 14, 2012. A true and accurate copy of the subject NOV is incorporated herein.
2. The water impoundment was constructed sometime between 1998 and 2000.
3. On November 21, 2013, the parties stipulated that the dam structure is more than 20 ft high in some spots and impounds more than a volume of 100 acre-feet of water.
4. On November 21, 2013, the parties further stipulated that the Moriaritys did not apply for or obtain a permit to build the dam from the DNR.
5. The Moriaritys stipulated to Ken Smith's qualifications. Mr. Smith testified that he observed streams on the Moriarity real estate.
6. Photographs 32, 33, and 34, taken in 2008 and admitted as part of stipulated Exhibit 7, show water flowing in a defined channel, rather than flowing over the entire surface of

the ground. Exhibit 7, photographs 19, 20, and 21 show the culvert through which water is flowing in a defined channel.

7. Photographs 31, 32, 33, and 34[2] show a small wooden footbridge, under which water flows to the lake in a defined channel.
8. Mr. Smith, based on his observations, believes that this dam qualifies as a high hazard dam. Exhibit 11, Photograph 138 clearly shows a building in close proximity to the dam. Further, George Crosby presented uncontroverted testimony that the road, also seen in Photograph 138, is a heavily traveled road.
9. DNR presented evidence of the dam's many deficiencies, which could lead to a failure. Exhibit 11, Photographs 138 and 139 show a sinkhole. Exhibit 11, Photographs 140, 141 and 142 show water, a sign of seepage. Exhibit 11, Photograph 146 provides evidence of failure to properly compact the soil. Exhibit 11, Photographs 154 and 155 show deficiencies in construction and the materials used for the dam. Exhibit 11, Photographs 167 and 168 show seepage, again an indication of deficiencies in the dam construction and design.
10. Exhibit 2 shows intermittent streams in the area of the Moriarity Lake and on the Moriarity real estate.
11. Rodney Neese surveyed Moriarity Lake in 2007. His observations and survey were documented in Exhibit 6A through 6E. He observed streams flowing through a pipe in both areas D and area C. He saw streams at inlet pipes 1 and 2. He observed defined channels at Inlet Pipes 1 and 2. The "V" shapes seen on 6A and 6B are indicative of stream channels. He concluded that there are streams on the Moriarity real estate.
12. Jon Eggen also visited the Moriarity real estate. He observed streams and, in particular, he noted a meandering stream channel. These features were obscured by various activities undertaken at the Lake, including earthmoving and flooding.
13. The DNR witnesses relied on various maps to determine whether streams exist on the Moriarity real estate, including aerial photography, soil maps and Stream Stats[3]. Exhibit 25 and 26 confirm the presence of streams. Exhibit 2 supports the conclusion that there were intermittent streams going into the Lake. The DNR witnesses did not rely on

[2] Part of stipulated Exhibit 7.
[3] An on-line GIS program, topographic map which maps water features, including streams.

topographic maps (Exhibit 1), as the scale of this Exhibit does not show sufficient details. The DNR witnesses did not use Exhibit 16, Streams and Lakes of Indiana, to determine whether streams exist on the Moriarity real estate, as this Exhibit did not provide sufficient detail and further was not meant to be a reliable source of accurate information. Exhibit 17 was also not used to determine if streams existed on Moriarity real estate. This Exhibit was specifically restricted to drainage areas of at least five miles. No one contended that this applied to the Moriarity real estate. Exhibit 18 was used to determine the owner of the Moriarity real estate.

14. Gary Miller qualified as a hydraulic engineer. While he did not visit the Moriarity real estate, he reviewed the materials available on the Moriarity real estate, including the aerial photographs and Stream Stats. He concluded after a review of all documents that there were streams in the Moriarity Lake, based on the following definition: a channel which captures surface water runoff into channel for flow.
15. Suzanne Dealy testified that she did a breach analysis of this impoundment. The analysis confirmed that the impoundment constituted a high hazard dam. Ms. Dealy's conclusions were submitted as Exhibit 24.
16. George Crosby also testified for the DNR. His conclusions were that the Moriarity Lake was created by damming streams. During his visits to the Property, he observed flowing water in defined channels in the area B.
17. The U.S. Geological Survey examined the soil survey maps and concluded that there were seven (7) first-order intermittent channel segments and one (1) second-order intermittent channel segments that crossed the Moriarity real estate. Exhibit 23.
18. Exhibit 11, Photograph 138 evidences the proximity of the dam to a church and a road, which Mr. Crosby describes as a high traffic road.
19. Heather Bobich testified for the Moriaritys regarding the presence of streams on the Moriarity real estate. She used regulatory guidance by the Army Corps of Engineers, which defines a stream as a landform with an ordinary high water mark. This is the only definition she used in her conclusion that no streams existed on the Moriarity real estate. She used Stream Stats to delineate the watershed. She noted that 2012 was a hot and very dry year.

20. She visited the Moriarity real estate in 2012. She inspected the Moriarity real estate for dry stream beds or other indications of streams that met the morphology of a stream. She observed no channels or ordinary high water marks. In her opinion, an ordinary high water mark is essential to identification of streams. She did not observe a barren wave swept shore near the lake. She reviewed the photographs admitted as Exhibit 7. Her conclusions were that the photographs showed standing water or wetlands. She further testified that none of the photographs showed a continuous ordinary high water mark.
21. She also relied on her observations of plant growth in determining whether streams existed on the Moriarity real estate. She opined that one indication of a stream would be a change in plant growth. She did not see such a change in the plant growth in the photographs admitted into evidence.
22. She did not observe any landform with a channel with defined banks, cut by erosion of water through turf or soil with a bottom over which water flows for a substantial period of the year or any landforms indicative of a watercourse as defined in I.C.§ 14-8-2-304. She did not see any channels, remnants or evidence of intermittent or ephemeral streams.
23. John Moriarity contacted the local area plan commission, the Army Corps of Engineers and the Indiana Department of Environmental Management to determine the requirements that these agencies might impose. He complied with instructions from the IDEM. He also contacted the DNR in 2002 requesting information regarding whether a permit was needed and what type of permit was needed. Further, after consultation with the DNR, he undertook modifications to the dam, such as the removal of trees and modifications to the spillway. The Moriaritys established a wildlife habitat on the Moriarity real estate.
24. Scott Dierks reviewed the breach analysis conducted by Suzanne Dealy. He found deficiencies in the analysis. One deficiency was the assumption about the water elevation. The DNR surveyor noted that the low point of dam is 858.7 feet. The analysis assumes the low point is 861 feet before the Probable Maximum Precipitation (PMP) rain event occurs. The affect of this error would be to overstate the depth of water and velocity of the water released in a breach.
25. Mr. Dierks also testified about Exhibit O. This Exhibit demonstrates an error in the breach modeling. His analysis of the cross-sections prepared by the DNR demonstrates

that the DNR model failed to use complete water paths in two (2) of the three (3) modeled flow paths. Exhibit P, which he prepared, projects the continuation of water flow in the topography around the Moriarity Lake.

26. He pointed out that the affect of these errors would be to lower the depth and velocity of a flood as a result of a dam failure. Further, he pointed out the breach analysis does not account for the effect the overflow path shown in area G on Exhibit 6D would have on the depth and velocity of a breach.
27. He concluded that the DNR's breach analysis does not present a scientifically valid projection of what would occur in the event of a breach because of alleged errors in: (1) the starting surface elevation in the lake; (2) the height to which water would rise in the lake; and (3) how water moves across the landscape. He concluded that the effect of a breach is overstated due to assumptions used in the model. However, he did not determine which classification this dam fell under or whether the dam was a high hazard dam based on the assumptions he would have used in place of the assumptions used by the DNR.
28. Ms. Delay rebutted some of these points. She stated that elevation of 861 was provided by the survey conducted by Mr. Neese. She further explained the principle of ineffective flow. This principle reflects that water will not effectively flow across areas where pooling occurs and accounts for the vertical walls shown in Exhibit O. She stated that the breach analysis takes ineffective flow into account. She included only the effective flow area in determining whether the dam was a high hazard dam. The model thus reflects the effective flow area for breach locations and flow paths she modeled.

C. Conclusions of Law

29. The Subject NOV was issued by the DNR pursuant to its authority under I.C. §14-25.5.
30. The Commission is the "ultimate authority" under AOPA and IC § 14-10-2-3 for administrative review of DNR notices of violation, including those under the Dams Safety Act and the Flood Control Act. Generally, *Yoder v. DNR & Bouwkamp*, 12 Caddnar 88 (2009).[4]

[4] As provided in Ind. Code § 4-21.5-3-32, an agency is required to index final orders and may rely upon indexed orders as precedent. Caddnar is the Commission's index of final orders.

31. The Commission has jurisdiction over the subject matter and over the persons of the parties.
32. I.C. §14-27-7.5 is referred to for purposes of this proceeding as the Dams Safety Act.
33. Judge Lucas concluded that the subject NOV was insufficient as a matter of law as it pertains to relief sought by the DNR under the Flood Control Act and 312 IAC 10. This conclusion is expressly incorporated herein.
34. All of the witnesses offered by the DNR and Ms. Bobich and Mr. Dierks are qualified to testify as experts and are highly credible.
35. Through stipulations made at the hearing[5], the Moriaritys concede that this impoundment is a "structure" as the Moriarity Lake impounds a volume of more than 100 acre-feet of water and exceeds 20 feet in height in spots.
36. The initial issue that must be addressed is whether the structure is subject to the requirements of the Dams Safety Act. The DNR "has, on behalf of the state, jurisdiction and supervision over the maintenance and repair of structures in, on, or along the rivers, streams, and lakes of Indiana". I.C. §14-27-7.5-8(1)(a).
37. The DNR has the burden of proving that the structure is "in, on, or along the rivers, streams and lakes of Indiana".
38. The parties present differing interpretations of "in, on, or along the rivers, streams and lakes of Indiana". The Moriaritys argue that the word "of" should be interpreted as meaning possession. They presented the testimony of Dr. Colleen Warren that the word "of" means possession, not location. While Dr. Warren is qualified to testify as to her area of expertise, she is not an attorney. There are specific rules for the interpretation of statutes, which Dr. Warren did not apply in reaching her conclusion that "of", as used in the context of the statute, means possession. Therefore, her testimony was not persuasive.
39. In statutory construction, "our primary goal is to ascertain and give effect to the intent of the legislature. *Gray v. D & G, Inc.*, 938 N.E.2d 256, 259 (Ind. Ct. App. 2010). The language of the statute itself is the best evidence of legislative intent, and we must give all words their plain and ordinary meaning unless otherwise indicated by statute. *Id.* Furthermore, we presume that the legislature intended statutory language to be applied in a logical manner consistent with the statute's underlying policies and goals. *Id.* However,

[5] Findings of fact #2 and 3.

we will not interpret a statute which is clear and unambiguous on its face; rather, we will give such a statute its apparent and obvious meaning. *Ind. State Bd. of Health v. Journal-Gazette Co*, 608 N.E.2d. 989, 992 (Ind. Ct. App. 1993), adopted, 619 N.E.2d 273 (Ind. 1993)." *United States Steel Corp., et al v. Northern Indiana Public Service Corp.* 951 N.E.2d 542, 552, (Ind. Ct. App. 2011).

40. In addition, "Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part." *Deaton v. City of Greenwood,* 582 N.E.2d 882, 885 (Ind. Ct. App. 1991); *Bourbon Mini-Mart v. IDEM,* 806 N.E.2d 14, 20; 2004 Ind. App. LEXIS 586 (Ind. Ct. App. 2004).
41. While possession may be one of the definitions for "of", it is not the exclusive definition. In keeping with the primary purpose of statutory interpretation, the language of the statute must be applied in a logical manner. Chapter 7.5 requires the owners of structures to comply with specific requirements, including, but not limited to, permitting, reporting, inspections and maintenance. I.C. §14-27-7.5-4 defines "owner", as "an individual, a firm, a partnership, a copartnership, a lessee, an association, a corporation, an executor, an administrator, a trustee, the state, an agency of the state, a municipal corporation, a political subdivision of the state, a legal entity, a drainage district, a levee district, a conservancy district, any other district established by law, or any other person who has a right, a title, or an interest in or to the property upon which the structure is located." If one applied the Moriaritys' definition, that is, that the chapter only applies to structures on streams owned by the State of Indiana, I.C. §14-27-7.5-4 would be completely superfluous.
42. "Further, if a court determines that the statute or rule is ambiguous, it may look to the agency's interpretation for evidence of the legislative intent. The Indiana Supreme Court, in *Shell Oil v. Meyer,* 705 N.E.2d 962, 976 (Ind. 1998) held, "However, administrative interpretation may provide a guide to legislative intent. 'A long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts." *Board of Sch. Trustees v. Marion Teachers Ass'n,* 530 N.E.2d 309, 311 (Ind. Ct. App. 1988); accord *Baker v. Compton,* 247 Ind. 39, 42, 211 N.E.2d 162, 164 (1965). DNR's long standing interpretation has been that it has

jurisdiction over privately owned structures that meet the requirements in I.C. §14-27-7.5-8(1)(a).

43. The Special ALJ concludes that the legislature intended the Dams Safety Act to apply to any structure in, on or along the rivers, streams or lakes owned by any entity that falls under the definition contained in I.C. §14-27-7.5-4, including, but not limited to, the State of Indiana.

44. The Dams Safety Act applies to the Moriarity structure.

45. The parties also do not agree as to the definition of "stream". The DNR's witnesses all provided definitions of "stream" as flowing water through a defined channel. The DNR's definition is consistent with the definitions provided by the parties as Exhibit 3, which includes definitions from both standard English dictionaries and technical dictionaries. The Moriaritys argue that Ms. Bobich's definition should be used. She relies upon the Army Corps of Engineers' definition. However, it is not necessary to use a technical definition of "stream". The legislature chose to use the word "stream" and chose not to define it. As "stream" has a common meaning, the failure to define it supports the conclusion that the legislative intent must have been to use the plain and ordinary meaning. Further, the DNR's long standing interpretation relies on the ordinary and common meaning of stream. Applying the rules of statutory construction, "stream" is clear and unambiguous and requires no further interpretation.

46. The Moriaritys argue that due process requires "ascertainable standards" and that the statute does not comply with this requirement. "In order to satisfy due process, an administrative decision must be in accord with previously stated, ascertainable standards." *Podgor v. Indiana University,* 178 Ind.App. at 258, 381 N.E.2d 1274 at 1283 (Ind.App. 1978). "This requirement is to make certain that administrative decisions are fair, orderly and consistent rather than irrational and arbitrary. The standards should be written with sufficient precision to give fair warning as to what the agency will consider in making its decision." *Id.*

47. Given that the word "stream" should be given its plain and ordinary meaning, the Moriaritys' arguments that the statute does not present an "ascertainable standard" must fail.

48. Mr. Smith, Mr. Crosby, Mr. Neese, Mr. Eggen and Mr. Miller all testified that they observed streams on the Moriarity real estate. The water features in areas A, B, D of Exhibit 6D are streams. The fact that water does not flow constantly is not determinative. Nor is size. Moreover, Exhibit 23 provides additional support for the conclusion that streams exist on the Moriarity real estate. The DNR proved by a preponderance of the evidence that the structure is built "in, on, or along the rivers, streams, and lakes of Indiana".
49. Further evidence in support of this conclusion are the culverts that were present to create dry crossings across the stream channels and the presence of tree lines, as shown in Exhibit 7, Photographs 35 and 36.
50. The DNR has met its burden in showing that the Moriarity Lake is a structure built on a stream of Indiana. Therefore, the DNR has jurisdiction over the maintenance and repair of this structure.
51. Having concluded that the Moriarity impoundment is on a stream of the State of Indiana, it is not necessary to determine whether the impoundment is also a lake. However, for the sake of clarity, the question is whether the structure is a "lake" will be addressed. As applicable to the Dams Safety Act and 312 IAC 10.5, lake means "a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both the depression and the body of water are of natural origin or part of a watercourse. If part of a watercourse, a lake may be formed by damming a river or stream." 312 IAC 1-1-21(a).
52. A "watercourse" is a running stream of water fed from permanent or natural sources. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may be sometimes dry but must flow in a definite channel having a bed or banks. BLACK'S LAW DICTIONARY, Sixth Edition (1990).
53. There is no contention that this is a natural lake. However, the lake was formed by damming the streams that were observed on the Moriarity real estate. These streams fall within the definition of watercourse. The Moriarity impoundment is consistent with definition of "lake".
54. The next issue is whether the structure was properly classified as a high hazard dam. I.C. §14-27-7.5-8(b)(1) states that a "High hazard" dam includes a "structure the failure of

which may cause the loss of life and serious damage to homes, industrial and commercial buildings, public utilities, major highways, or railroads." If the structure is a high hazard dam, I.C. §14-27-7.5-9 sets out the duties with which the owner must comply, including, having a professional engineer inspect the structure and report to the DNR.

55. 312 IAC 10.5-3-1 states:

> (a) The division shall assign whether a dam is classified as:
> (1) high hazard;
> (2) significant hazard; or
> (3) low hazard;
> based on best information available.
> (b) In making the determination of assignment under subsection (a), the division shall apply existing U.S. Army Corps of Engineers Phase 1 reports and other appropriate documentation.
> (c) The division may also consider observations of the dam and the vicinity of the dam, including the risk posed to human life and property if the dam fails.
> (1) If an uncontrolled release of the structure's contents due to a failure of the structure may result in any of the following, the dam shall be considered high hazard:
> (A) The loss of human life.
> (B) Serious damage to:
> (i) homes;
> (ii) industrial and commercial buildings; or
> (iii) public utilities.
> (C) Interruption of service for more than one (1) day on any of the following:
> (i) A county road, state two-lane highway, or U.S. highway serving as the only access to a community.
> (ii) A multilane divided state or U.S. highway, including an interstate highway.
> (D) Interruption of service for more than one (1) day on an operating railroad.
> (E) Interruption of service to an interstate or intrastate utility, power or communication line serving a town, community, or significant military and commercial facility, in which disruption of power and communication would adversely affect the economy, safety, and general well-being of the area for more than one (1) day.
> (2) If an uncontrolled release of the structure's contents due to a failure of the structure may result in any of the following, the dam shall be considered significant hazard:
> (A) Damage to isolated homes.
> (B) Interruption of service for not more than one (1) day on any of the following:

(i) A county road, state two-lane highway, or U.S. highway serving as the only access to a community
(ii) A multilane divided state or U.S. highway, including an interstate highway.

(C) Interruption of service for not more than one (1) day on an operating railroad.

(D) Damage to important utilities where service would be interrupted for not more than one (1) day, but either of the following may occur:

(i) Buried lines can be exposed by erosion.
(ii) Towers, poles, and aboveground lines can be damaged by undermining or debris loading.

56. The Moriaritys moved to strike Suzanne Delay's testimony regarding the breach analysis. While there was sufficient evidence presented to call into question some of Ms. Delay's conclusions, there is no basis for striking her testimony. Any evidence of inconsistencies in the report goes to the weight of the evidence, not its admissibility.

57. Further, even without Ms. Delay's testimony, there is sufficient evidence to support the DNR's conclusion that this is a high hazard dam. Visual classification is appropriate in accordance with the rule, as stated above. Mr. Smith and Mr. Crosby testified that there is a strong possibility that damage could be done to nearby structures if the dam would fail. Because of the proximity of the dam to the structures, there is a strong likelihood that serious damage to homes and commercial buildings would result. Exhibit 10, Photograph 181 and Exhibit 11, Photograph 138, shows the proximity of a house and other structures to the dam. The maps in Exhibit 6 show the proximity of a county road (CR 200S/E. 28th Street) to the dam. The DNR presented uncontroverted evidence that this is a high traffic road.

58. The next issue that must be addressed is whether the Moriaritys violated the requirements of the Dams Safety Act. The parties have stipulated that the Moriaritys did not apply for a permit for this dam. Further, the DNR presented uncontroverted evidence that the Moriaritys did not comply with the requirement to have a professional engineer inspect the dam every two (2) years and submit a report to the DNR (I.C. §14-27-7.5-9(a)).

59. The DNR is authorized to assess civil penalties for violations of I.C. §14-27.[6] The NOV seeks an initial civil penalty of Thirty Five Thousand Dollars ($35,000) from the

[6] I.C. §14-25.5-1-1(2) and I.C. §14-25.5-4-3.

Moriaritys. The DNR assessed a $10,000 fine for failure to obtain a permit (I.C. §14-27-7.5-8); a $5,000 fine for failure to file an inspection report for a high hazard dam (I.C. §14-27-7.5-9) in 2005, 2007, 2009 and 2011; and a $5,000 fine for failure to "perform recommended maintenance, repairs, or alterations to the structure." I.C. §4-27-7.5-9(c)(2). The DNR presented no evidence regarding the basis for the penalties assessed.

60. In assessing civil penalties, there are four (4) factors which the Commission considers. These are (1) whether the initial offense was deliberate; (2) whether a violation continued unabated after notice by the Department; (3) whether the person committing the violation worked in good faith to remedy the harm; and (4) what immediate or potential harm was presented by the violation to persons, property or the environment?[7]

61. Additional factors that can be considered include: (1) whether the failure to comply was willful or malicious; (2) whether the violator had corrected or attempted to correct the violations; (3) whether the violator took any abatement actions; and (4) whether actual environmental harm is occurring or that such harm is imminent.[8]

62. The following are mitigating factors. It is clear that the Moriaritys made attempts to determine if permits were necessary by contacting the local plan commission, the Army Corps of Engineers, the Indiana Department of Environmental Management and the DNR. The DNR was not able to identify specifically which permit the Moriaritys needed for the construction of this lake. Further, the Moriaritys attempted to correct some of the deficiencies that earlier DNR inspections had identified. In addition, the Moriaritys set aside a portion of the property as a wildlife habitat indicating that the failure to comply with the DNR's demands was not malicious.

63. As the effective date of the Dams Safety Act is 2002 and the dam was constructed in 2000, no penalty is assessed for failure to obtain a permit.

64. The Subject NOV is divided into two (2) parts. Part A attempts to resurrect an enforcement action begun in 2007 and concluded in 2010 (Cause No. 08-137W).[9] This enforcement action resulted in an order against John Moriarity only and in favor of the DNR. The DNR attempted to enforce the order in Grant County. Grant County Superior

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[7] *Department of Natural Resources v. Fulton County, et al.* 6 CADDNAR 123 (1993).
[8] *Integrity Energy Systems, Inc. v. DNR,* 7 CADDNAR 30 (1994).
[9] As the DNR has presented sufficient evidence to support the findings and conclusions contained in this Order, it is not necessary to determine if this Order should be considered as law of the case, res judiciata, or collateral estoppel.

Court issued its Order Dismissing Case Due to Improperly Named Defendant and Inability to Join Party Needed for Just Adjudication on October 11, 2011. The Court refused to enforce the order as the property is held by the Moriaritys as tenants by the entirety and the order from the Commission was against John Moriarity alone. No penalties will be assessed for violations that were the subject of this previous order.

65. Part B of the Subject NOV was based on an inspection done on November 21, 2011. The Moriaritys were aware that the DNR considered this to be a high hazard dam, however, they failed to comply with the requirement that a professional engineer inspect the dam and submit a report to the DNR. Further, the Moriaritys were aware that the DNR had found several alleged deficiencies and had failed to take action to correct these deficiencies.

66. In the DNR's proposed Findings and Conclusions, the DNR proposes an order assessing a penalty of $763,200 based on continuing penalties assessed for each day that the Moriaritys failed to comply with the NOV. However, I.C. §14-25.5-2-3 states that the NOV "becomes effective without a proceeding under IC 4-21.5-3 unless a person requests administrative review under IC 4-21.5-3-6 within thirty (30) days after receipt of the notice." *Emphasis added.* As the Moriaritys requested administrative review, the continuing penalties did not accrue during the time this matter was pending before the Natural Resources Commission.

67. Mr. Smith's and Mr. Crosby's testimony proves by a preponderance of the evidence that the dam has deficiencies that require correction.

D. NONFINAL ORDER

1. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to draw down the water level in the Moriarity impounded lake to an elevation of between 840 and 845 feet NAVD. They shall, both jointly and severally consult with a professional engineer duly licensed in Indiana pursuant to IC 25-31 qualified in dam construction, maintenance and safety to develop a safe and appropriate dewatering plan for accomplishing the draw down as herein ordered.
2. The water level of the impounded lake shall be maintained at between 840 and 845 feet NAVD until the Moriaritys, both jointly and severally, have complied with the remainder of this Order as set forth below in Paragraphs 3 and 5.

3. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to comply with I.C. 14-27-7.5-9(a) by having their dam inspected by a professional engineer licensed pursuant to IC 15-31 and qualified in dam construction, maintenance and safety, and submitting a report of that inspection to the DNR's Division of Water within ninety (90) days of the issuance of a final order in this proceeding. Such engineering inspection shall be completed as required to fulfill the usual and customary requirements of the DNR.
4. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to comply with I.C. 14-27-7.5-9(b) by completing any maintenance, repair or alteration as required to fulfill the usual and customary requirements of the DNR.
5. In lieu of compliance with Paragraphs 1 through 4 above, John E. Moriarity and Mae E. Moriarity, both jointly and severally, under the direction of a professional engineer pursuant to IC 25-31 and qualified in dam construction, maintenance and safety, dewater, breach and permanently decommission the dam.
6. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to pay the following civil penalties for their violations of the Dams Safety Act as set forth in the above Findings of Fact, Conclusions of Law:
    a. $5,000 for not submitting a high hazard inspection report in 2011 as required by I.C. §14-27-7.5(a)
    b. $5,000 for not maintaining and keeping their dam in a state of repair and operating condition required by the exercise of prudence, due regard for life and property and the application of sound and accepted technical principles as required by I.C. §14-27-7.5-9(c).

Dated: April 15, 2015

Catherine Gibbs
Special Administrative Law Judge
Natural Resources Commission
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BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:	)	
	)	
JOHN E. MORIARITY and MAE E. MORIARITY, Husband and Wife Claimants,	)	Administrative Cause Number: 12-094W
	)	
vs.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES, Respondent.	)	(NOV VTS-3933-DM)

MORIARITYS' OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND NONFINAL ORDER, AND REQUEST FOR A HEARING ON THE RECORD

The Moriaritys object to the finding of DNR jurisdiction over the structure on their land and its classification as a high hazard dam. As a matter of law, no jurisdiction exists and the structure cannot be classified as a high hazard dam pursuant to the plain language of the statute cited by the Court. More specifically:

Issue One - The Court erred as a matter of law by post-hoc adopting a definition of the word "stream" never previously stated by DNR as the standard to be used to determine jurisdiction, and therefore there was not an ascertainable standard establishing DNR jurisdiction (especially in light of the other objections raised below). Based upon that post-hoc adoption of that definition, the Court erred in finding the existence of jurisdiction.

Issue Two - The Court erred as a matter of law by post-hoc adopting a "plain and ordinary" meaning of the word "stream" over other "plain and ordinary" definitions that

would not support the finding of a stream on the Moriarity property. DNR witnesses testified that some of the "plain and ordinary" definitions of streams as contained in Ex. 3 would result in the conclusion that there are no streams on the Moriarity property. In the face of those plain and ordinary meanings of "stream" not bestowing jurisdiction, the Court erred in selecting "flowing water through a defined channel" (Conclusion of Law ¶45), and finding the existence of jurisdiction on the basis of that one definition among many.

Issue Three - The Court erred as a matter of law by post-hoc selecting a certain map to show the presence of "streams" on the Moriarity property when no map was previously designated by the agency as the reference for such a determination, and therefore there was not an ascertainable standard for demonstrating DNR jurisdiction. Based upon that post-hoc adoption of that certain map, the Court erred in finding the existence of jurisdiction. The post-hoc selection of a particular map for the purpose of finding DNR jurisdiction is particularly egregious because the most "widely used map" (7.5 minute quadrangle) (described as such in DNR publications) does not show any streams on the Moriarity property, and neither does DNR's own published map entitled "Streams & Lakes of Indiana."

Issue Four - The Court erred as a matter of law in finding jurisdiction over the structure on the Moriarity property given its finding that "the DNR was not able to identify specifically which permit the Moriaritys needed for the construction of the lake." The absence of any identifiable permit establishes that the Moriaritys could not determine, through previously stated ascertainable standards, the existence of any

jurisdiction on the part of DNR. The Court thus erred as a matter of law in finding the existence of jurisdiction.

Issue Five - The Court erred as a matter of law by finding the Moriarity structure to be in, on, or along a stream of Indiana given the lack of evidence that there was a stream on the Moriarity property during the structure's construction in 1998-2000, at the time the Dam Safety Act became effective in 2002, or from the date of the Notice of Violation in 2012 to present day. DNR's only evidence of a stream on the Moriarity property is from 2008 – four (4) years before the NOV giving rise to this litigation. That statute speaks in present tense, and only the field inspection of Heather Bobich in 2012 (the year of the NOV) relates to whether the Moriarity structure is presently in, on, or along a stream of Indiana. (Ind. Code 14-27-7.5-8(1)(a)). The Court thus erred as a matter of law in finding the existence of jurisdiction.

Issue Six - The Court erred as a matter of law by finding that the Moriarity structure was in, on, or along a stream of Indiana because there was not "substantial and reliable" evidence upon which to make that finding. Ind. Code 4-21.5-3-27(d) requires, "Findings must be based upon the kind of evidence that is substantial and reliable." The Court thus erred as a matter of law in finding the existence of jurisdiction.

Issue Seven - The Court erred as a matter of law by finding the Moriarity structure to be a "high hazard dam", contrary to the plain language of 312 IAC 10.5-3-1. As cited in the Court's decision, that regulation requires:

> (a) The division shall assign whether a dam is classified as:
> (1) high hazard;

(2) significant hazard; or
(3) low hazard;
based on best information available.

(b) In making the determination of assignment under subsection (a), the division shall apply existing U.S. Army Corps of Engineers Phase I reports and other appropriate documentation.

(Emphasis added). The record is devoid of any required "existing U.S. Army Corps of Engineers Phase I report and other appropriate documentation." The conjunctive in subsection (b) requires that a high hazard determination may only be made if a U.S. Army Corps of Engineers Phase I report exists. None exists. The high hazard determination by the Court is thus error as a matter of law.

Issue Eight - The Court erred as a matter of law by finding the Moriarity structure is a "lake" as defined by 312 IAC 1-1-21(a) because it is not part of a "watercourse." The Court's post-hoc adoption of the definition of "watercourse" from Black's Law Dictionary, as opposed to its "plain and ordinary" meaning as set forth by common dictionaries (like the Court used for stream) or in technical dictionaries, was neither previously stated, ascertainable, nor consistent with the evidence. Because the Moriarity structure is not in, on, or along a stream of Indiana, it is similarly not "part of a watercourse." The Court thus erred as a matter of law in finding the existence of jurisdiction.

Pursuant to 312 IAC 3-1-12(f), the Moriaritys request that the hearing before the Natural Resource Commission Committee be on the record with a court reporter.

Respectfully submitted,

KATZ & KORIN, PC

By_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record via first class United States mail, postage prepaid, this 1st day of May, 2015:

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BEFORE THE
NATURAL RESOURCES COMMISSION
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STATE OF INDIANA

IN THE MATTER OF:	)	
	)	
JOHN E. MORIARITY and MAE E. MORIARITY, Husband and Wife Claimants,	)	Administrative Cause Number: 12-094W
	)	
vs.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES, Respondent.	)	(NOV VTS-3933-DM)

RESPODENT'S REPONSE TO CLAIMANTS' OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NONFINAL ORDER

The Respondent Department of Natural Resources ("DNR"), by counsel, responds to the Claimants' objections to the Special Administrative Law Judge's ("ALJ") Finding of Facts, Conclusions of Law, and Non-Final Order and states the following (Respondent is responding to each issue as labeled by Claimants):

I. Issue One

The ALJ did not err by using a common and ordinary meaning of the word "stream." The Dam Safety Act (Ind. Code § 14-27-7.5-8) does not define the word "stream." The goal in statutory construction is to determine and give effect to legislative intent. *Hall Drive Ins., Inc. d/b/a Don's Hall's Guesthouse v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002). Words are to be given their plain, ordinary, and usual meaning, unless a contrary purpose is shown by the statute or ordinance itself. *Nora Northside Community Council, Inc. v. Pinnacle Media, LLC & DNR*, supra at 107; *MDM, Inv. v. City of Carmel*, 740 N.E.2d 929, 934 (Ind. Ct. App. 2000); *JKB, Sr. v. Armour Pharm. Co.*, 660 N.E.2d 602, 605 (Ind. Ct. App. 1996).

The ALJ determined that since the legislature did not define the word "stream," they intended on applying the common meaning. This comports with the rules of statutory construction. Further, DNR's witnesses consistently testified that the definition of a stream was flowing water through a channel, consistent with the plain and ordinary meaning of the word. The ALJ's finding not only comports with the rules of statutory construction, but also is supported by ample credible evidence in the record.

The Claimants argued only one definition of the word "stream" is appropriate—the Army Corps of Engineers' technical definition. The legislature could have opted to use this definition, but as the ALJ correctly decided, they did not and instead intended to apply the common and ordinary meaning of the word "stream." Further, since "stream" has a plain and ordinary meaning, the ALJ was correct in deciding that there was in fact an ascertainable standard and that the statute complied with this requirement of due process.

II. Issue Two

The ALJ can use whatever plain and ordinary definition as long as it is based in the evidence presented. Just because the ALJ did not choose the definition of the word "stream" that supported the Claimants' argument does not mean that she erred as a matter of fact or as a matter of law. There was an abundance of evidence in the record to support the ALJ's finding that streams exist on the Moriarity real estate. DNR personnel—subject matter experts—observed streams on the Moriarity real estate. United States Geological Survey personnel also identified streams on the Moriarity real estate. DNR presented a wealth of other documentation showing the presence of streams such as aerial photographs, U.S. Geological Survey's StreamStats, and the U.S. Department of Agriculture's Soil Survey.

The Claimants offered no other definition of the word "stream" other than that proffered by Heather Bobich, which was the technical definition derived from the Army Corps of Engineers. Bobich's definition is rigid, and Claimants rely on it to get around the more inclusive "plain, ordinary, and usual meaning" required by Indiana law in applying proper principals of statutory construction. Thus the ALJ correctly determined the definition of the word "stream," and the credible evidence on the record supports this finding.

III. Issue Three

Credible evidence at the hearing showed that it was impossible for 7.5 quad maps and the "Streams & Lakes of Indiana" maps to show streams because of their scale. DNR provided an abundance of other evidence that did show the presence of streams on the Moriarity real estate. The ALJ was correct in finding that the DNR proved by a preponderance of the evidence that the structure is built "in, on, or along the rivers, streams, and lakes of Indiana."

IV. Issue Four

The ALJ did not err in finding the existence of jurisdiction. The Claimants' attempt to determine whether or not a permit was necessary for construction of their lake and dam is irrelevant to whether or not the DNR has jurisdiction over the dam. There is sufficient evidence on the record to support the conclusion that the Moriarity's dam is high hazard subject to regulation by the DNR.

V. Issue Five

"[A]n applicant must not gain an advantage in the licensure process because natural resources were destroyed and are less obviously ascertainable as a result of the unlicensed activities." *Shoaff Mullin and DeVille v. Ft. Wayne Zoological Society and DNR*, 8 CADDNAR 157 (2000). When the Moriaritys constructed their dam they destroyed all existing evidence of

stream channels under the footprint of the dam and lake. DNR offered credible evidence, however, showing the existence of streams at the site of the dam and lake, though some were altered and degraded. The ALJ's finding that streams exist on the Moriarity property is based on credible and substantial evidence.

VI. Issue Six

The ALJ determined that the Moriairty dam is on a stream of Indiana. That finding was based upon substantial and reliable evidence in the record. DNR personnel—subject matter experts—observed streams on the Moriarity real estate. United States Geological Survey personnel also identified streams on the Moriarity real estate. DNR presented a wealth of other documentation showing the presence of streams such as aerial photographs, U.S. Geological Survey's StreamStats, and the U.S. Department of Agriculture's Soil Survey. Thus, the ALJ did not err in finding jurisdiction.

VII. Issue Seven

Claimants' only cite part of the Rule regarding dam hazard classification. 312 Ind. Admin. Code § 10.5-3-1 also provides that "[t]he division may also consider observations of the dam and the vicinity of their dam, including the risk posed to human like and property if the dam fails." 312 Ind. Admin. Code § 10.5-3-1(c)(1) says that if a dam breach could result in serious damage to homes, industrial buildings, or interrupt service for more than one (1) day on a county road then the dam shall be considered high hazard. Evidence on the record showed that there is a strong likelihood that serious damage to homes and commercial buildings would result if the dam fails. In addition, uncontroverted evidence showed that the dam is also in proximity of a

county road that is high traffic. The determination that the dam is high hazard comports with 312 Ind. Admin. Code § 10.5-3-1 and is supported by the evidence on the record.

VIII. Issue Eight

This issue is entirely irrelevant. Because the ALJ found that the Moriarity dam is on a stream of Indiana, DNR has jurisdiction over the maintenance and repair regardless of whether the body of water is a "lake." Regardless, the ALJ's finding that the body of water is a "lake" is based on evidence in the record.

WHEREFORE, DNR requests that the AOPA Committee of the Natural Resources Commission affirm the decision of the ALJ entered herein.

Respectfully submitted,

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of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on the 22nd day of May, 2015, on the following:

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